

March 28, 2006

**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: **WRITTEN EX PARTE PRESENTATION**

WT Docket No. 03-66; Amendment of Parts 1, 21, 73, 74 and 101 of the  
Commission's Rules to Facilitate the Provision of Fixed and  
Mobile Broadband Access, Educational and Other Advanced Services  
in the 2150-2162 and 2500- 2690 MHz Bands

Dear Ms. Dortch:

The National ITFS Association ("NIA") and the Catholic Television Network ("CTN") provide this response to an ex parte communication submitted in this proceeding on March 23, 2006, on behalf of the Wireless Communications Association International, Inc. ("WCA") on the issue of the possible modification of the existing Educational Broadband Service ("EBS") lease requirement limiting such leases to 15 years.<sup>1</sup> We wish to address three points made by WCA in order to avoid any misunderstanding.

First, WCA argues that all economic evidence in this proceeding indicates that imposing term limits on EBS leases will diminish commercial investment in the band. However, irrespective of whether WCA's economic analysis is in fact correct, the *public interest* requires consideration of matters going beyond economics.<sup>2</sup> There is no doubt that if the Commission's only goal was to maximize commercial use of the band, it might make other choices about issues such as EBS eligibility and EBS lease terms. The fact is, however, that the Commission quite rightly found in the Report and Order in this proceeding that "the public interest favors preserving this spectrum for licensing to ITFS-eligible entities and that doing

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<sup>1</sup> See letter from Paul J. Sinderbrand, counsel to WCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed March 23, 2006).

<sup>2</sup> NIA and CTN themselves have agreed to substantial increases in the EBS lease term limit, out of concern that there be sufficient investment in the band.

so will further the educational objectives that led to the establishment of ITFS.”<sup>3</sup> As NIA and CTN have previously shown, permitting unlimited or excessively long EBS lease terms would be tantamount to selling the spectrum for commercial use in contravention of the Commission’s prior public interest determination.

Second, WCA argues that there is no FCC *rule* currently limiting EBS lease terms to 15 years and, therefore, if the FCC adopts any standard shorter than infinity, it must grandfather all already outstanding leases with such lease terms. WCA is engaging in word games. NIA and CTN readily concede that there is no “rule” governing EBS lease terms, if by the word “rule” WCA means a section in the Code of Federal Regulations. However, as WCA well knows, there has *never* been any such “rule” governing lease terms. For over two decades, the FCC has articulated such requirements as binding policies in its rule making decisions, without codifying them into its rules.<sup>4</sup>

This is precisely the situation today. In the Report and Order, the Commission moved EBS into the Secondary Markets leasing regime, but extended once again, by policy (and not by adoption of a rule in the Code of Federal Regulations), the prior existing requirement that “the lease term may not exceed 15 years.”<sup>5</sup> Unless WCA now argues that the FCC’s longstanding policy limiting ITFS/EBS lease terms was and is unenforceable because the Commission proceeded by articulating policies and not by codifying rules, there is no basis for the suggestion that the FCC must “grandfather” leases by parties who chose, whether by impunity or by wishful thinking, to ignore this requirement.

Third, WCA disingenuously suggests that because the FCC staff has granted certain EBS *de facto* transfer lease applications in situations where overall lease terms may exceed 15 years, the Commission (or at least the FCC staff) must have

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<sup>3</sup> Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 03-66, 19 FCC Rcd 14165 (2004) (“Report and Order”) at ¶ 152.

<sup>4</sup> See Second Report and Order in MM Docket No. 83-523, 101 FCC 2d 49 (1985) at ¶ 104 (adopting for the first time a requirement that ITFS lease arrangements be limited to the 10-year term of ITFS licenses, but not codifying the requirement in the Code of Federal Regulations); Memorandum Opinion and Order on Reconsideration in MM Docket No. 83-525, 59 RR 2d 1355 (1986) at ¶ 50 (retaining on reconsideration the 10-year maximum on ITFS lease terms, without codifying the requirement in CFR); Report and Order in Gen Docket No. 90-54, 5 FCC Rcd 6410 (1990) at ¶ 40 (retaining maximum ITFS lease term of 10 years, without codifying the requirement in CFR); Report and Order in MM Docket No. 93-24, 10 FCC Rcd 2907 (1995) at ¶ 38 (retaining and clarifying “policy” to permit lease terms of up to 10 years maximum); Report and Order in MM Docket No. 97-217, 13 FCC Rcd 19112 (1998) at ¶¶ 133-34 (adopting a new, 15 year ITFS lease term limit, again without codifying such limit in CFR).

<sup>5</sup> Report and Order at ¶ 181.

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agreed that lease terms are not still limited to 15 years. However, as WCA well knows, when filing EBS lease applications on Form 603-T, applicants only seek, and the Commission only approves, lease terms running through the end of an EBS licensee's then-outstanding license term. EBS licenses run for 10 years. Thus, in the year or so that the Secondary Market regime has been in effect for EBS, the staff has *never* approved any EBS lease for any term running beyond the current 15 year lease term limit.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, we are submitting this presentation by filing an electronic copy of this letter in the public record of the proceeding.

Should any questions arise concerning this matter, kindly contact undersigned counsel.

Respectfully submitted,

Todd D. Gray  
Counsel, National ITFS Association  
Network

Edwin N. Lavergne  
Counsel, Catholic Television

Dow, Lohnes & Albertson, pllc  
1200 New Hampshire Avenue, NW  
Washington, D.C. 20036  
202-776-2571  
[tgray@dowlohnesh.com](mailto:tgray@dowlohnesh.com)

Fish & Richardson, P.C.  
1425 K Street, NW  
Washington, D.C. 20005  
202-783-5070  
[lavergne@fr.com](mailto:lavergne@fr.com)

cc: Hon. Kevin J. Martin  
Hon. Michael J. Copps  
Hon. Jonathan S. Adelstein  
Hon. Deborah Taylor Tate  
Fred Campbell  
John Giusti  
Barry Ohlson  
Aaron Goldberger  
Catherine Seidel  
Joel Taubenblatt  
John Schauble  
Leslie Marx  
Evan Kwerel

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Walter Strack

Wayne Leighton